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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JESUS LOPEZ BERUMEN, Defendant and Appellant.	B168676 (Los Angeles County Super. Ct. No. BA218689)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael E. Pastor, Judge. Affirmed.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, William T. Harter, Supervising Deputy Attorney General, and Shawn McGahey Webb, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant, Jesus Lopez Berumen, appeals from the judgment entered following his conviction, by jury trial, for first degree murder, with a firearm use enhancement (Pen. Code, §§ 187, 12022.53, subd. (d)). Sentenced to state prison for 50 years to life, he contends there was trial error.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

Louis Solorzano and his fiancée, Darlene Inez Berumen, were living with Solorzano's aunt, Yolanda Moreno, her husband, Daniel Gallegos, and her two children, in a small two-bedroom apartment. Each bedroom had a windowless bathroom which could be entered only from the adjoining bedroom. Moreno's family slept in one bedroom; Solorzano and Darlene slept in the other. In late May and early June 2001, defendant Berumen was staying with Solorzano and Darlene, sleeping on a couch in their room. Berumen was Gallegos's nephew, Darlene's cousin, and Solorzano's friend. The apartment was on the top floor of a three-story building. There were no fire escapes. The only way to enter the apartment was by the front door. The front door had a deadbolt, which Moreno kept locked at all times for her children's safety.

Solorzano and Darlene, who was pregnant, had plans to move out of the apartment and into their own place. Solorzano told Berumen that if he wanted to move with them, he would have to get a job so he could pay his share of the expenses. They argued about this; Solorzano was angry because he wanted Berumen to get a job, but Berumen didn't want to. Solorzano also confronted Berumen about the fact that when Berumen's girlfriend telephoned the apartment she asked to speak with Solorzano, not Berumen, which made Darlene jealous and upset. Solorzano yelled at Berumen about this.

During the last week of May, Darlene walked into the bedroom one day to find Solorzano and Berumen looking at a semi-automatic handgun. Darlene had not previously known of the gun's existence; apparently it had been hidden in the bedroom.

On most weekday mornings, Solorzano dropped Darlene off at school and then either drove to his job or returned home if he wasn't working that day. Solorzano had been working regularly as a movie studio grip. On June 4, Solorzano drove Darlene to school at 7:30 a.m. She was going to call him at home during her 9:00 a.m. break. Gallegos left the apartment early that morning. Moreno drove her older son to school and then returned to the apartment between 7:30 and 8:00 a.m. with her younger son. When she pulled into the garage, she saw Solorzano parking his car. After she went into the apartment, Moreno locked the front door and took her son into their bedroom. Thereafter, she did not hear the front door open or any strange noises coming from Solorzano's bedroom.

At 9:00 a.m., Moreno checked to make sure the front door was locked, and then she took a shower. While showering, she heard a noise and felt the water turn cold, which meant someone had turned on the shower in Solorzano's bathroom. About this time, Darlene called from school. Berumen answered the phone and told her Solorzano was in the shower. As Moreno was getting dressed, she heard gunshots. One bullet came through the wall separating her bedroom from Solorzano's bathroom. Moreno ran into the hall and saw Berumen running from Solorzano's bedroom. Berumen tried to leave, but the front door was locked. As he unlocked the door, Moreno saw he had what looked like a rolled-up shirt tucked under his left arm. Berumen ran out of the apartment. Moreno went out to the landing and saw Berumen run down the stairs. She did not see anyone else leave the apartment.

Marie Fimbres, an off-duty 911 dispatcher, happened to be eating breakfast in a restaurant across the street from Moreno's apartment building that morning. She saw Berumen jump over a six-foot high fence next to the apartment and run across the street into the restaurant's parking lot. Fimbres testified, "Something was going on, but I wasn't sure if . . . somebody was after him or, you know, you don't normally jump the fence like that." Berumen appeared to be holding something at his waistband with his right hand as he ran.

Meanwhile, Moreno had gone back into the apartment to look for Solorzano. She found him in the bathtub. The shower was on and Solorzano was soapy and covered with blood. Moreno ran next door and had her neighbor call 911. Solorzano died from two gunshot wounds to the head. One bullet had entered the middle of his forehead, and the other had entered the right side of his nose. The entry wounds were surrounded by tiny marks called pseudostippling, which had been caused by glass spray, indicating the shots had been fired through the glass shower doors. Solorzano had no defensive wounds. The physical evidence was consistent with a scenario in which the first bullet hit him in the nose, knocking him to his knees, after which the second bullet hit him in the forehead.

A search of the apartment revealed no signs of forced entry or any other indication of an intruder. Bullet casings recovered at the scene had been fired from a semi-automatic handgun. No gun was found in the apartment. The box spring of Solorzano's bed had an imprint in it which appeared to be the impression of a gun.

Berumen never returned to the apartment after the shooting. He did not contact the occupants, pick up his personal possessions, or attend Solorzano's funeral. He was arrested at his grandmother's house in Victorville two weeks after the shooting.

2. *Defense evidence.*

The building manager testified there were a lot of visitors to the apartment. Berumen's uncle also testified there was a lot of foot traffic in and out of the apartment at all hours. The uncle worked on cars out of his home garage and Berumen occasionally helped him. That morning, he had called Berumen between 7:00 and 7:30 a.m. to say he would come by later that morning to pick Berumen up. But when he arrived at the apartment, the shooting had already taken place.

A detective who spoke to Moreno at the scene testified she reported that when she ran from her bedroom after the gunshots, Berumen was already running out the open front door. Moreno did not say Berumen had unlocked the front door or that he had anything in his hands.

3. *Rebuttal evidence.*

A supervising detective testified he had been the one who interviewed Moreno at the scene, while the other detective just took notes. According to the supervising detective, Moreno said she saw Berumen open the front door before running out.

CONTENTIONS

1. There was insufficient evidence of premeditation and deliberation.

2. The trial court erred by refusing to admit evidence under the excited utterance hearsay exception.

3. The trial court erred by letting a detective give his opinion that Berumen was guilty.

4. There was cumulative error.

DISCUSSION

1. *Sufficient evidence of premeditation and deliberation.*

Berumen contends there was insufficient evidence to sustain the verdict of first degree murder because there was an insufficient showing of premeditation and deliberation. This claim is meritless.

"Generally, there are three categories of evidence that are sufficient to sustain a premeditated and deliberate murder: evidence of planning, motive, and method. [Citations.] When evidence of all three categories is not present, 'we require either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing.' [Citation.] But these categories of evidence, borrowed from *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 . . . , 'are descriptive, not normative.' [Citation.] They are simply an 'aid [for] reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.' [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1224.) Here, there was some evidence of each *Anderson* factor.

The evidence showed there had been at least two disagreements between Berumen and Solorzano in the period leading up to the shooting, and that Solorzano was angry at

Berumen. In addition, Solorzano had given Berumen an ultimatum about getting a job if he wanted to move out with Solorzano and Darlene. This constituted some evidence of motive. Although Berumen asserts there was no evidence of planning activity whatsoever, the Attorney General correctly points out the jury could have inferred Berumen "was familiar with the household and knew that a weekday morning when [Solorzano] did not have to work would provide the best window of opportunity to kill him."[1] Berumen also knew there was a semi-automatic handgun hidden in the bedroom, and this appears to have been the weapon he used to shoot Solorzano.

As for the manner of killing, the jury could reasonably infer Berumen had carried out an execution-style killing. Solorzano had no defensive wounds, and Moreno had not heard any sounds of a struggle or an argument that morning. Berumen simply walked into the bathroom and shot Solorzano twice in the head. The bullets came crashing through the glass shower doors, presumably taking the unsuspecting and vulnerable Solorzano completely by surprise. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 768 ["firing of the gun at Sergeant Wolfley's face is a manner of killing that was entirely consistent with a preconceived design to take his victim's life"]; *People v. Hawkins* (1995) 10 Cal.4th 920, 956, disapproved on other grounds by *People v. Lasko* (2000) 23 Cal.4th 101 [forensic evidence showing victim shot in back of head and neck, one shot being fired from close range, and that victim might have been crouching or kneeling, was sufficient to prove premeditation and deliberation]; *People v. Bloyd* (1987) 43 Cal.3d 333, 348 [execution-style killings (one victim shot in head at point-blank range while

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[1] As the Attorney General detailed this point: "[Berumen] had stayed at [Solorzano's] apartment on prior occasions and, at the time of the murder, had been sleeping on the couch . . . for over a week. It stands to reason that he knew the daily routine of the household and had concluded that the best time to kill [Solorzano] without an eyewitness would be on a morning that [Solorzano] did not work and after he returned from taking Darlene to school. At such time, [Gallegos] would be at his job, [Moreno] would either be driving her older son to school or in the other bedroom with her younger son and, most importantly, [Berumen] would be alone with [Solorzano] in the bedroom."

lying on her back, second victim shot from foot away while kneeling) were very strong evidence of deliberation and premeditation].)

Because the evidence supported an inference the shooting of Solorzano " 'was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse,' " there was sufficient evidence of premeditation and deliberation. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1224.)

2. *Evidence properly excluded under excited utterance theory*.

Berumen contends the trial court erred by excluding exculpatory testimony that should have been admitted as an excited utterance under Evidence Code section 1240. This claim is meritless.

The People moved in limine to exclude any testimony from Moreno that when Berumen ran from the apartment, after the shots were fired, she heard him say, " 'They're shooting. They're shooting. Stay inside.' " Following a hearing, the trial court ruled it would exclude the evidence, in part because Berumen had "sufficient opportunity and incentive for fabrication." However, during Moreno's subsequent direct examination, she testified that when she opened her bedroom door after hearing the shots and saw Berumen run out of the apartment, she heard him say, " 'They're shooting.' " The prosecutor asked the trial court to strike this testimony and the trial court did so, telling the jury to disregard it.

Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." "[T]he basis for the circumstantial trustworthiness of spontaneous utterances is that in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief. [¶] The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is . . . not the nature of the statement but the mental state of the speaker. The nature

of the utterance -- how long it was made after the startling incident and whether the speaker blurted it out, for example -- may be important, but solely as an indicator of the mental state of the declarant." (*People v. Farmer* (1989) 47 Cal.3d 888, 903-904, disapproved on other grounds by *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) The decision to admit or exclude the evidence under Evidence Code section 1240 is reviewed for abuse of discretion. (*People v. Phillips* (2000) 22 Cal.4th 226, 236.)

As we said in *People v. Gutierrez* (2000) 78 Cal.App.4th 170, 181, "In the final analysis the issue is whether the statement has an indicia of reliability so as to permit its admission in the absence of the declarant's testimony." Courts have routinely disallowed alleged excited utterance testimony where the declarant had a reason to lie. (See *People v. Fain* (1959) 174 Cal.App.2d 856, 861 [after accident, defendant-declarant had strong motive to lie about who was driving because he had lost his driver's license for speeding violations and had it returned only the day before]; *People v. Keelin* (1955) 136 Cal.App.2d 860, 870-871 [victim-declarant's identification of defendant was suspicious because victim had motive to lie]; *Dolberg v. Pacific Electric Ry. Co*. (1954) 126 Cal.App.2d 487, 488-489 [motorman, who had been driving defendant's train when it hit plaintiff's truck, had obvious reason to lie about how the accident happened].)

The trial court here did not abuse its discretion by excluding the hearsay evidence as lacking sufficient indicia of reliability because Berumen had an obvious incentive to lie. The great weight of the evidence shows it was Berumen himself who shot Solorzano. Against the weight of this evidence, Berumen puts up mere speculation that some unknown person came into the apartment, went into Solorzano's bathroom, shot him, and then disappeared without Moreno seeing him or her, and that it was in response to this event that Berumen said, "They're shooting." Berumen asserts that, even if the evidence tended to show he had shot Solorzano, it was improper to exclude the hearsay statement because the evidence did not conclusively establish he was the gunman. But that's precisely the relevant test for admissibility. (See *People v. Anthony O*. (1992) 5 Cal.App.4th 428, 433-434 [proof of excited utterance foundational facts, such as whether declarant actually perceived the event in question or if the declaration was

reliable, are tested by preponderance of the evidence standard]; see also *People v. Tewksbury* (1976) 15 Cal.3d 953, 966 ["in the determination of a preliminary fact which conditions the admissibility of a hearsay statement to be considered on the merits by the trier of fact, the court's determination is to be made on proof by a preponderance of the evidence"].)

Berumen complains the trial court considered the fact there was no evidence of any physical reaction, as there had been in *People v. Sully* (1991) 53 Cal.3d 1195, where the hearsay declarant vomited when he witnessed the exciting event. Of course, Berumen is right that, in general, the excited utterance declarant only has to witness the exciting event, not be sickened by it. However, in *Sully* the excited utterance had been made by a person who shared culpability with the defendant for having caused the violent act that constituted the exciting event. In these circumstances, *Sully* found some evidence of genuine emotional distress in the fact the hearsay declarant had been physically sickened by the exciting event.[2] Had there actually been a second person involved in the killing of Solorzano, this aspect of *Sully*'s analysis would have been pertinent.

The trial court properly excluded Moreno's testimony.

3. *Testimony of Detective Ortiz properly admitted*.

Berumen contends the trial court erred by letting Detective Ortiz, the lead investigator on the case, testify to some of the statements Berumen made to him, and to testify he believed Berumen was guilty. This claim is meritless.

Berumen tried to undermine the prosecution's case by challenging the thoroughness of Ortiz's investigation. At a sidebar, the trial court agreed with the

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2 Thus, *Sully* reasoned: "Moreover, contrary to defendant's suggestion that Francis's utterance must be regarded as self-serving and unreliable because he, too, was involved in the crime, the underlying facts show: a shocking event (defendant's smashing of Barrett's face with a sledgehammer), genuine emotional distress and actual physical illness on Francis's part as shown by his vomiting into a wastebasket, a simple observation by him, and no apparent opportunity to reflect or falsify. These factors supply a sound basis to regard Francis's utterance as reliable evidence." (*People v. Sully, supra*, 53 Cal.3d at p. 1229.)

prosecutor's argument that, if Berumen attacked Ortiz's credibility in this way, it would be proper to rehabilitate Ortiz by asking why he considered Berumen to be the only viable suspect. The trial court reasoned that trying to show Ortiz had been lazy, biased or unprofessional would put Ortiz's state of mind at issue, and therefore the "People can bring in why he did or did not do something [in order] to explain his state of mind. Not for the truth, not to offer his opinion as to whether the defendant is guilty or not, but to explain why he did or didn't do something." The trial court also pointed out, however, that any *statements* Berumen made to Ortiz might be admissible both as non-hearsay state-of-mind evidence *and* as party admissions.

Ortiz testified Berumen told him he had been sitting on a couch in Solorzano's bedroom when he heard gunshots coming from Solorzano's bathroom. Berumen did not say there was anyone else in the bedroom, or that he saw anyone else leave the room. Berumen denied having seen a gun in the apartment. He also denied the truth of Fimbres's statement that she had seen him jump over the fence clutching his waistband.

The following colloquy then occurred:

"Q. By [the prosecutor]: After talking to Jesus Berumen, did you feel the need to . . . interview some of the people from these F.I. [field investigation] cards?

"A. No.

"Q. Do [*sic*] you think you had your person?

"A. Yes.

"Q. Why?

"A. Based on all the --

"The Court: Excuse me. The Court is going to sustain an objection to the answer [*sic*]. 'Do you feel you had the person,' that is stricken. It is to be disregarded as is the next comment after that."

The following colloquy occurred outside the jury's presence:

"The Court: . . . What is the qualitative difference, Mr. Lebovich [the prosecutor], between you asking the detective if he felt he had the right person and did you think the defendant was guilty?

"Mr. Lebovich: Because it goes to why he stopped the investigation.

"The Court: I figured as much, but I did not want the jury to be misled and that is exactly, I think, the basis for the question. I don't consider it bad faith on your part, but I do believe it may have been interpreted ambiguously and that is the reason why I struck it. But again, I want to caution you from going in that direction."

Berumen argues it was improper to admit evidence of his interview statements in order to explain Ortiz's reasons for pursuing him as the sole suspect, "because it is inappropriate to allow police officers, whether testifying as lay witnesses or as experts, to render an opinion on the defendant's guilt." But the cases Berumen relies on are inapposite because they involved situations in which the testimony could only have been intended to directly bolster the prosecution's case-in-chief. (See *People v. Smith* (1989) 214 Cal.App.3d 904, 914-915 [officer testified he believed victim's dying declaration, naming person who had shot him, was truthful]; *People v. Sergill* (1982) 138 Cal.App.3d 34, 38-40 [officers testified they believed the child who reported molestation was being truthful].) Here, the whole point of the prosecutor's questioning of Ortiz was to rebut the claim his investigation had been inadequate by showing Ortiz focused on the person he properly considered the only viable suspect.

4. *There was no cumulative error*.

Berumen contends that, even if harmless individually, the cumulative effect of errors in his trial mandates reversal. Because we have found no errors, his claim of cumulative error fails. (See *People v. Seaton* (2001) 26 Cal.4th 598, 639; *People v. Bolin* (1998) 18 Cal.4th 297, 335.)

DISPOSITION

The judgment is affirmed.

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KLEIN, P.J.

We concur:

CROSKEY, J.

ALDRICH, J.